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In The Supreme Court of the United States

October Term, 1989

CHANDLER CLEMONS

PETITIONER

VERSUS

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether The Eighth Amendment Permits An Appellate Court To Save A Sentence Of Death By Reweighing Aggravating and Mitigating Factors Where The Authority For Capital Sentencing Rests Exclusively With The Jury.

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NO. 88-6873

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

CHANDLER CLEMONS,
Petitioner

versus

STATE OF MISSISSIPPI,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

This matter is before the Court on the Petition of Chandler Clemons for a Writ of Certiorari to the Supreme Court of The State of Mississippi wherein the Court affirmed his conviction of capital murder and sentence of death.

OPINIONS BELOW

The opinion of the Mississippi Supreme Court is reported as Clemons v. State, 535 So.2d 1354 (Miss.1988). A copy of the opinion is attached as an exhibit

to the Petition for Writ of Certiorari in this case.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. §1257(3) challenging the constitutionality of his sentence of death.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has adequately identified the pertinent constitutional and statutory provisions involved and appended them to his brief.

STATEMENT OF THE CASE

A. Substantive Facts:

The facts of this brutal murder reflected by the record in this case show that on the afternoon of April 17, 1987, Anthony Calvin met his friend Darwin Hunter at the Big Star Grocery Store just

off Fisher Road in Warren County. Calvin, who was shopping with his mother at the time, left her to go riding with Hunter in his automobile. While riding, they went to the home of Antonio Hay on Lillye Drive. Not finding Hay at home they went to Chandler Clemons' house; he was not at home either. They then drove to Ron Evans' house, found him at home, and telephoned Hay. Hay was told that they would come to his house and pick him up within an hour. These events took place at approximately five o'clock in the afternoon. Upon arriving at Hay's house they found him ironing the clothes he was going to wear for the evening. Not wanting to waste time they told him they would go and get Chandler Clemons and return for him. Calvin, Hunter and Evans drove to where Clemons lived, talked

with Clemons' for a while and all four then left the house.

They got into Hunter's car and went back to Hay's house to pick him up. After getting Hay, they went to the hospital where his mother worked so that Hay could get some money. While Hay was in the hospital, Clemons began talking to the others about stealing a radio to replace the one that had been stolen from Hunter's car. When Calvin demurred, Clemons put a sawed off shotgun to Calvin's head and said "I'll blow your fucking brains out." This gun had been brought to the car by Hay from his house. Clemons had gotten the gun from under the seat when Hay went into the hospital. Hunter intervened and told Clemons to put the gun down. After Hay returned to the car they took Ron Evans home and proceeded to Garry Hubbard's house. When they reached

Hubbard's house, Clemons began saying that he needed some money and suggested robbing a pizza delivery man. Calvin asked to be taken home, but his request was refused. Hubbard and Hay continued talking about this robbery by discussing which location would be the best from which to make the telephone call ordering the pizza. They decided not to call from Hubbard's house, but went instead to a pay telephone where Hay placed a call to Domino's Pizza. Hay ordered one pizza and requested that the delivery man bring change for a fifty dollar bill. The pizza shop informed Hay that the maximum that their delivery people carried was change for twenty dollars. Hay changed the order to two pizzas and asked that they be delivered to them on Lover's Lane where they would meet him. The pizza shop employee informed Hay that they did not deliver to that

location. Hay canceled the order and hung up the telephone.

The five then drove around, stopping by a friend's house and one of their grandmother's house. They then travelled to Woodglen Apartments where Hubbard and Hunter got out of the car and went to a party in progress there. The remaining three, Clemons, Hay, and Calvin, left the apartments in Hunter's car and drove to the Big Star Grocery Store and placed a second call to Domino's Pizza. Clemons made this second call in which he ordered one pizza. Clemons asked the pizza shop to deliver the pizza to apartment No. 56, Woodglen Apartments. Clemons, Hay and Calvin drove back to the Woodglen Apartments and parked the car. Hay and Clemons got out of the car, Clemons taking the shotgun and Hay taking a stick. They walked over by the apartments and waited.

Calvin remained in the car. Arthur Shorter, the pizza delivery' man, arrived with the pizza and drove up the long hill to the apartments. Clemons hollered to Calvin to drive the car down the hill. Calvin complied and stopped the car part of the way down the hill. Hay came out of the shrubbery by the street and got into the car.

Shorter, finding no one at apartment No. 56, got back in his car and drove back down the hill towards the main road passing Hay and Calvin as he did so. Clemons had gone to the bottom of the hill, and when Shorter approached Clemons flagged him down. Clemons got into Shorter's car and forced him at gunpoint to drive back up the hill to where Hay and Calvin waited. When they arrived, Clemons got out of Shorter's car brandishing the shotgun. Clemons told Shorter to get out

of the car and take everything out of his pockets. Shorter complied, emptying his pockets. Clemons took approximately five dollars and two pizzas from Shorter. Hay got out of the car. He walked over to Shorter, grabbed his car keys and threw them into the bushes beside the street. Shorter started to run after his keys. Clemons stopped him and ordered him to lay down in the street. Shorter complied, lying down on his stomach. Clemons started towards the car when Hay asked him if Shorter had seen his face. Clemons stated that he had. Hay then said, "Chandler, you got to blow his head off because he can identify you." Calvin said not to shoot him and urged them to leave. Hearing this discussion, Shorter began begging Clemons not to shoot him, telling him that he could have everything he had. Hay got into the car taking over the

driving duties from Calvin and drove the car abreast of the spot where Shorter was on the ground. Clemons then shot Shorter and got into the car. As they were driving away, Calvin looked back and saw Shorter momentarily raise his head.

The three drove away, stopped and ate some of the pizza and then went back to the party where they had left Hunter and Hubbard. They had been at the party for about five minutes when Calvin asked Hunter to take him home. Calvin got home and went to bed but could not sleep. He finally got up and went into the living room where he found Charles Bracey, a Warren County jailer, visiting his sister. He told Bracey about the murder.

Shorter did not die immediately. He remained alive long enough to crawl over to his car, where much blood was found on its side. Evidently remembering that the

keys had been thrown into the bushes beside the street Shorter set off either toward the apartment complex or on a search for the keys so he could get help. On his way for help he lost consciousness and later died.

After the murder Clemons disposed of the gun in a hole behind his house. He then went sleep and the next morning got up and went fishing. While Clemons was fishing the sheriff, having Calvin's oral statement, went to Clemons house. Word was left for him to call the sheriff on his return. On his return, Clemons called the sheriff who went and arrested him.

B. <u>Procedural History:</u>

Petitioner was indicted for capital murder during the May 1987 Term of the Circuit Court of Warren County, Mississippi. On motion for change of venue the trial was moved to Harrison

County, Mississippi. Petitioner's trial began on July 20, 1987. After the jury was empaneled petitioner was tried on the indictment and found guilty of capital murder. After the jury returned the guilty verdict, they heard evidence in aggravation and mitigation of sentence and arguments of counsel. They then retired to consider the sentence to impose. After due consideration the jury returned a sentence of death in proper form with the following findings:

> We the jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the commission of the capital murder:
>
> 1. Contemplated that lethal force would be employed.
>
> We the jury unanimously find that the aggravating circumstances of:
>
> 1. Capital offense was committed while

> the defendant was engaged in the commission of robbery and was committed for pecuniary gain;
>
> 2. The capital offense was especially heinous, atrocious or cruel

> are sufficient to impose the death penalty and that there are insufficient mitigating circumstances, and we unanimously find that the defendant should suffer death.

Tr. 1249.

Petitioner then took his automatic appeal to the Mississippi Supreme Court. The claim regarding the second aggravating circumstance was not raised in the briefs submitted to the court below. However, during oral argument before the court below petitioner raised the additional claim relating to this Court's decision in Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). After oral argument, the Court requested briefs

on this issue. On November 30, 1988 the court below issued its opinion affirming both the conviction and sentence of death imposed in this case. A petition for rehearing was filed and later denied on December 21, 1988. Clemons v. State, 535 So.2d 1354 (Miss. 1988).

Petitioner filed a timely petition for writ of certiorari with this Court on March 21, 1989. On June 19, 1989, after response by the state, this Court granted certiorari limited to the first question presented. Clemons v. Mississippi, ___ U.S. ___, 109 S.Ct. 3184, 105 L.Ed.2d 693 (1989).

SUMMARY OF THE ARGUMENT

The affirmance of the sentence of death by the Mississippi Supreme Court after invalidating an aggravating circumstance by applying a harmless error or reweighing analysis does not offend the

Eighth and Fourteenth Amendments of the United States Constitution. This conclusion is supported by the rulings of this Court in Zant v. Stephens, 462 U.S. 862 (1983); Barclay v. Florida, 463 U.S. 939 (1983); Wainwright v. Goode, 464 U.S. 78 (1983) and Satterwhite v. Texas, 486 U.S. ___, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988). The application of a harmless error or reweighing analysis was proper in this case because no constitutionally inadmissible evidence was admitted for consideration by the jury in support of this aggravating circumstance. Even had inadmissible evidence been admitted, a harmless error analysis still would have been in order. Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Johnson v. Mississippi, 486 U.S. ___, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) (White, J., concurring.).

The Mississippi Supreme Court has a recognized limiting construction of the "especially heinous" aggravating circumstance and has applied it in this case on appellate review. Where an appellate court applies its limiting construction of this aggravating circumstance, it can cure the infirmity of allowing the jury to consider this circumstance under a vague instruction at trial. Maynard, supra; Godfrey v. Georgia, 446 U.S. 420 (1980).

ARGUMENT

I.

Whether The Eighth Amendment Permits An Appellate Court To Save A Sentence Of Death By Reweighing Aggravating and Mitigating Factors Where The Authority For Capital Sentencing Rests Exclusively With The Jury.

The issue confronting the Court in the case at bar is whether it is permissible under the Eighth and Fourteenth Amendments for an appellate court, after finding one of several aggravating circumstance to be invalid, to apply a harmless error standard and affirm the sentence of death. While this case involves the "especially heinous, atrocious or cruel" aggravating circumstance the question to be resolved is not so narrow as to pertain only to this circumstance. We submit that the

precedent of this Court holds that the action taken by the Mississippi Supreme Court in the case at bar is permissible under the Eighth and Fourteenth Amendments and that there is no constitutional prohibition in the Court taking such action in other cases.

We begin our argument with a trilogy of cases which control the outcome of this case. The first is Zant v. Stephens, 462 U.S. 862 (1983). Zant held that the invalidation of an aggravating circumstances would not invalidate a sentence of death where another valid circumstance or circumstances remain. While the Court expressly reserved the question of whether this rule would apply "under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its

discretion whether or not to impose the death penalty," we think the rationale of the Court does apply in this circumstance. 462 U.S. at 890. The ultimate decision of this Court rested on two grounds. First, the evidence of Stephens' prior convictions was not inadmissible in a federal constitutional sense in the consideration of whether or not to impose the sentence of death. Second, the Court held:

> Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality. We accept that court's view that the subsequent invalidation of one of several statutory aggravating circumstances does not automatically require reversal of the death penalty, having been assured that the death penalty will be set aside if the invalidation of an aggravating circumstance make the penalty arbitrary or

> capricious. 250 Ga, at 101, 287 S.E.2d at 4. The Georgia Supreme Court, in its response to our certified question, expressly stated: "A different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was not otherwise admissible, and thereafter the circumstance failed." Ibid. As we noted in Gregg, 428 U.S, at 204-205, we have also been assured that a death sentence will be vacated if it is excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances. [Footnote omitted.]

462 U.S. at 890.

Looking to the teachings of Zant, we contend that evidence and testimony setting forth the facts of the crime and the manner in which Arthur Shorter was killed are admissible both at the guilt and sentence phase of a capital murder

trial.[1] No inadmissible evidence was introduced or argued in support of the "especially heinous" aggravating circumstance.[2] The problem with this aggravating circumstance is that the instruction given to the jury did not limit its scope, thereby falling prey to the concerns of vague jury instruction expressed in Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). Therefore, we have the question

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[1] The State put on no further proof in the sentencing phase of the trial of this case. Instead, the State requested that the jury be instructed that they could "consider all of the evidence and exhibits as were previously heard, offered into evidence and accepted into evidence as evidence during the sentencing phase of this particular trial." This request was granted and the State rested on the record. Tr. at 1100-1101.

[2] Respondent submits the comments relating to Mr. Shorter's character were not admitted or argued in support of this aggravating circumstance. We will discuss this issue more fully infra.

of admissible evidence and a vague instruction, the same question faced in Zant.

The second ground used in affirming Zant was the automatic appellate review and proportionality review provisions of the Georgia statutory scheme. Mississippi's statutory scheme requires mandatory appellate review of the sentence for both arbitrariness and proportionality. Miss. Code Ann., § 99-19-105 (Supp. 1989). The Mississippi Supreme Court, obedient to the statutory command, has performed this task in every death penalty case it has affirmed. The Court below has not hesitated to reverse sentences of death[3] for the presence of

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[3] Of the seventy-nine (79) death penalty cases decided by the Mississippi Supreme Court on direct appeal since the reinstitution of the death penalty thirty-one (31) have been reversed.

arbitrary factors in the sentence phase of the trial. Williams v. State, 544 So.2d 782 (1987); Lanier v. State, 533 So.2d 473 (Miss. 1988); Stringer v. State, 500 So.2d 928 (Miss. 1986); Mhoon v. State, 464 So.2d 77 (Miss. 1985); Cannaday v. State, 455 So.2d 713 (Miss. 1984); Wiley v. State, 449 So.2d 756 (Miss. 1984). Further, the Court has reduced death sentences to life because it found the sentence to be disproportionate to the crime. Williams v. State, 445 So.2d 798 (Miss. 1984); Edwards v. State, 441 So.2d 84 (Miss. 1983); Coleman v. State, 378 So.2d 640 (Miss. 1979).[4] Therefore, this

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[4] The Mississippi Supreme Court has recently reduced two death sentences to life: Reddix v. State, 547 So.2d 792 (Miss. 1989) and Bullock v. State, 525 So.2d 764 (Miss. 1987). While petitioner claims these remands to life imprisonment are proportionality remands, both cases resulted in a life sentence because of the Mississippi Supreme Court's rule mandating that where a majority of the court cannot

Court has the same assurance of mandatory appellate review from the court below that it had from the Georgia Supreme Court when affirming Zant.

The second case in this trilogy is Barclay v. Florida, 463 U.S. 939 (1983). In Barclay, the Court considered the invalidity of an aggravating circumstance in the context of a weighing statute. In Barclay, as in Zant, the information the sentencer was allowed to consider was improper under state law although still admissible under the federal constitution. As in Zant and Barclay, the jury here did not consider any improper evidence since neither the Eighth Amendment nor Mississippi law prohibits the admission of the factual circumstances surrounding the

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agree on the same disposition of the case the defendant is sentenced to life imprisonment. 547 So.2d at 797.

murder in question and its brutality. Therefore, the evidence was fully admissible.

The Court considered a similar question relative to a weighing statute in Barclay. The issue was defined as whether the

> consideration of this improper aggravating circumstance so infects the balancing process created by the Florida statute that it is constitutionally impermissible for the Florida Supreme Court to let the sentence stand.

463 U.S. at 956.

The Court then held:

> There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly effect the balance. See n. 9, supra. "What is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the

> crime." Zant, supra, at 879 (emphasis in original).
>
> In this case, as in Zant, supra, at 890, our decision is buttressed by the Florida Supreme Court's practice of reviewing each death sentence to compare it with other Florida capital cases and to determine whether "the punishment is too great." State v. Dixon, 283 So.2d 1, 10 (1973).

463 U.S. at 958.

Factually Clemons and Barclay are quite comparable. The affirmance of the death sentence for Clemons comports with the teachings of Barclay[5] and Zant.

Finally, we find in the per curiam opinion in Wainwright v. Goode, 464

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5 We note that the opinion of Justice Rehnquist in Barclay is a plurality opinion. However, the concurring opinion of Justices Stevens and Powell does not differ greatly from that of the plurality. The concurrence also focused on whether the evidence was admissible in a federal constitutional context and the function of appellate review in determining whether the imposition of the ultimate penalty is warranted. 463 U.S. at 962-973.

U.S. 78 (1983), instructive. Faced with the introduction of evidence of the future dangerousness of the defendant, evidence inadmissible under state law to support a death sentence, this Court reiterated the question as stated by Barclay and found that the balancing process was not so infected:

> A properly instructed jury recommended a death sentence. On direct appeal to the Florida Supreme Court, the court stated that "[c]omparing the aggravating and mitigating circumstances with those shown in other capital cases and weighing the evidence in the case subjudice, our judgment is that death is the proper sentence." Goode v. State, 365 So.2d, at 384-385. Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered Goode's future dangerousness. Consequently, there is no sound basis for concluding that the procedures followed by the State produced an arbitrary or

> freakish sentence forbidden by the Eighth Amendment.

464 U.S. at 86-87.

Again we have a jury receiving proper information that is not allowed by state law. The distinction in the case at bar is that the evidence received by the jury was permissible under both the state and federal constitutions. The flaw in Clemons was that the instruction failed to properly inform the jury how to consider the admissible evidence relative to the circumstance.

In the case at bar, after considering the impact of the lack of a narrowing instruction on the "especially heinous" aggravating circumstance the court below held:

> We likewise are of the opinion beyond a reasonable doubt that the jury's verdict would have been the same with or without the "especially heinous,

atrocious or cruel" aggravating circumstance.

B.
FURTHER REVIEW

In accordance with Mississippi Code Annotated § 99-19-105(3)(a), (b), (c), and (5) (Supp. 1988) and the decisions of this Court and the federal courts on imposition of the death penalty, we have reviewed further the record in this case and have compared it and the death sentence imposed in the cases decided by this Court since Jackson v. State, 337 So.2d 1242 (Miss. 1976), which cases are set forth in Appendix A.

In our opinion, after a review of those cases coming before this Court, and comparing them to the present case, the punishment of death is not too great when the aggravating and mitigating circumstances are weighed against each other, and the death penalty will not wantonly or freakishly be imposed in this case.

From our independent review, we further find and conclude that the death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor, and that the sentence of death

> is not excessive or disproportionate to the penalty imposed in those cases since 1976, considering both the crime and the manner in which it was committed and the defendant; that the death penalty imposed on Clemons is consistent and evenhanded to like and similar cases; and that the sentencing phase followed in his trial provided a meaningful basis for distinguishing the few cases in which the death penalty is imposed and the many cases in which it is not imposed.

535 So.2d 1364-1365.

The Mississippi Supreme Court was doing nothing more than accepting the invitation of this Court in Maynard. In the concluding paragraphs of that opinion this Court stated:

> The State also insists that the death penalty should stand because the jury found two aggravating circumstances, one of which was unchallenged and is sufficient to sustain the sentence. When this case was decided, however, the Oklahoma Court of Criminal Appeals would not attempt to save the death penalty when one of several aggravating circumstances found

by the jury was found invalid or unsupported by the evidence. As the Tenth Circuit said there was"no provision for curing on appeal a sentencer's consideration of an invalid aggravating circumstance." Id., at 1482. If this was the case at the time, and the State does not dispute it, the Court of Appeals cannot be faulted for not itself undertaking what the state courts themselves refused to do.

It is true that since the decision of the Court of Appeals, the Oklahoma Court of Criminal Appeals has restricted the "heinous atrocious, or cruel" aggravating circumstance to those murders in which torture or serious physical abuse is present. Stouffer v. State, 742 P.2d 562 (1987). At the same time, the court decided that it would not necessarily set aside a death penalty where on appeal one of several aggravating circumstances has been found invalid or unsupported by the evidence. Id., at 564. See also Castro v. State, 754 P.2d 394, 408-409 (1987), cert denied, 485 U.S. ___, 99 L.Ed.2d 446, 108 S.Ct. 1248 (1988).

What significance these decisions of the Court of Criminal Appeals have for the

> present case is a matter for the state courts to decide in the first instance. Like that of the Court of Appeals, our judgment is without prejudice to further proceedings in the state courts for redetermination of the appropriate sentence.

100 L.Ed.2d at 382-383.

The Mississippi Supreme Court interpreted this language as an invitation to follow its own precedent holding that the invalidity of one of several aggravating circumstances did not necessarily invalidate the sentence of death.[6] Such a reading of Maynard was

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[6] Pinkney v. State, 538 So.2d 329, 355-358 (Miss. 1988), Lanier v. State, 533 So.2d 473, 491 (Miss. 1988); Nixon v. State, 533 So.2d 1078, 1099-1100 (Miss. 1987); Lockett v. State, 517 So.2d 1346, 1355 (Miss. 1987); Lockett v. State, 517 So.2d 1317, 1336 (Miss. 1987); Faraga v. State, 514 So.2d 295, 309 (Miss. 1987); Johnson v. State, 511 So.2d 1333, 1337 (Miss. 1987); Stringer v. State, 500 So.2d 928, 945 (Miss. 1986); Irving v. State, 498 So.2d 305, 314 (Miss. 1986); Wiley v. State, 484 So.2d 339, 351-52 (Miss. 1986); Edwards v. State, 441 So.2d 84, 92 (Miss. 1983); Tokman v. State, 435 So.2d 664, 670

reinforced by the concurrence of Justice White and the Chief Justice in Johnson v. Mississippi, 486 U.S. ___, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), wherein the following invitation was made:

> It is left to the Mississippi Supreme Court to decide whether a new sentencing hearing must be held or whether that court should itself decide the appropriate sentence without reference to the inadmissible evidence, thus undertaking to reweigh the two untainted aggravating circumstances against the mitigating circumstances. Cf. Cabana v. Bullock, 474 U.S. 376, 88 L.Ed.2d 704, 106 S.C.t 689 (1986). [Emphasis added.]

100 L.Ed.2d at 588.

This interpretation was further buttressed by the fact that the Court of Appeals for the Fifth Circuit has specifically approved this manner of dealing with

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(Miss. 1983); Evans v. State, 422 So.2d 737, 743 (Miss. 1982).

invalid aggravating circumstances not only by the Mississippi Supreme Court, but by the Louisiana court as well.[7] In fact the majority of the states addressing the issue allow such a reweighing or harmless error analysis to be conducted in such

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[7] **Mississippi cases:** Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), cert. pending, No. 88-7000; Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1328, 103 L.Ed.2d 597 (1989); Evans v. Thigpen, 809 F.2d 239 (5th Cir.), cert. denied, ___ U.S. ___, 107 S.Ct. 3278, 97 L.Ed.2d 782 (1987); Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), cert. denied, 480 U.S. 951, 107 S.Ct. 1618, 94 L.Ed.2d 802 (1987). **Louisiana cases:** Rault v. Butler, 826 F.2d 299 (5th Cir.), cert. denied, ___ U.S. ___, 108 S.Ct. 14, 97 L.Ed.2d 803 (1987); Celestine v. Butler, 823 F.2d 74 (5th Cir. 1987), cert. denied, 483 U.S. 1036, 108 S.Ct. 6, 97 L.Ed.2d 796 (1987); Welcome v. Blackburn, 793 F.2d 672 (5th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1985, 95 L.Ed.2d 825 (1987); Moore v. Maggio, 740 F.2d 825 (5th Cir. 1984); cert. denied, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985); Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) (en banc), cert. denied, 463 U.S. 1214, 103 S.Ct. 3553, 77 L.Ed.2d 1456 (1983).

situations.[8] Further, the other federal circuits addressing the issue have respected the state procedures on this issue.[9] From a reading of the opinion in Clemons it is clear that the Mississippi

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[8] Baldwin v. State, 456 So.2d 117, 125-128 (Ala.Crim.App. 1983), aff'd, Ex parte Baldwin, 456 So.2d 129, 140 (Ala. 1984); State v. Poland, 144 Ariz. 412, 698 P.2d 207, 210-211 (1985); People v. Bittaker, 48 Cal.3d 1046, 774 P.2d 659, 691-692, 259 Cal.Rptr. 630 (1988); Flamer v. State, 490 A.2d 104, 135-136 (Del. 1983); Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988); Foster v. State, 258 Ga. 736, 374 S.E.2d 188, 196-197 (1988); State v. Tassin, 536 So.2d 402, 312 (La. 1988); State v. Johns, 679 S.W.2d 253, 267 (Mo. 1984); State v. Taylor, 304 N.C. 249, 283 S.E.2d 761, 784-785 (1981); Stouffer v. State, 742 P.2d 562, 564-565 (Okla. Crim. 1987); Commonwealth v. Smith, 518 Pa. 15, 540 A.2d 246, 262 (1988); State v. Jones, 288 S.C. 1, 340 S.E.2d 782, 783-784 (1985); State v. Bobo, 727 S.W.2d 945, 955-956 (Tenn. 1987); Stout v. Commonwealth, 237 Va. 126, 376 S.E.2d 288, 292 (1989).

[9] Mercer v. Armontrout, 844 F.2d 582, 584 (8th Cir. 1988); Neuschafer v. Whitley, 816 F.2d 1390, 1393 (9th Cir. 1987); Coleman v. Saffel, 869 F.2d 1377, 1387-1390 (10th Cir. 1989); Lindsey v. Thigpen, 875 F.2d 1509, 1515 (11th Cir. 1989).

Supreme Court was applying the harmless error test found in Chapman v. California, 386 U.S. 18 (1967)[10] to the situation here. Since no inadmissible information went to the jury in support of this aggravating circumstance, there is no error in the action taken by the Mississippi Supreme Court in the case at bar. See, Zant, Barclay, and Goode.

The broader question before this Court was alluded to in Zant when Justice Stevens noted:

> The Georgia Supreme Court, in its response to our certified question, expressly stated: "A different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was not otherwise admissible, and thereafter the circumstance failed."

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[10] The Chapman case involved a death penalty although prior to the present-day guided discretion statutes.

462 U.S. at 890.

The Georgia Supreme Court was expressing its intention not to apply a harmless error analysis mechanically in every case. The court below was faced with a case presenting this question after the reversal by this Court of the death penalty in Johnson v. Mississippi, supra. On remand the Mississippi court held in Johnson v. State, 547 So.2d 59 (Miss. 1989):

> There are two courses open to this Court: (1) remand this cause to the circuit court of Pike County for another sentencing hearing, or (2) make the decision ourselves as to whether to reimpose the death penalty or reduce Johnson's sentence to life because of the invalidation of this aggravating circumstance which was considered by the original trial jury.
>
> As Cabana v. Bullock, fn. 1, supra, makes clear there is no United States Constitutional requirement that "a jury consider the appropriateness of

> a capital sentence." 474 U.S. at 386, 106 Ct. [sic] at 696-97, 88 L.Ed.2d 716.
>
> In Maynard v. Cartwright, ___ U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372, 382 (1988), the U.S. Supreme Court held an "especially heinous, atrocious, or cruel" aggravating circumstance under Oklahoma Stat. Title 21, § 701-12(2) and (4) was unconstitutionally vague. This Court in Clemons v. State, 535 So.2d 1354, 1361-1363 (Miss. 1988), held that even though under Maynard v. Cartwright an "especially heinous, atrocious, or cruel" aggravating circumstance should not have been submitted to the sentencing jury, this did not necessitate setting aside a death sentence so long as one or more other valid aggravating circumstances remained, which the jury had found existed in that case. And the above-noted special concurring opinion in Johnson v. Mississippi, fn. 1, also makes clear, this Court is not required to remand this case to another sentencing jury.

547 So.2d at 60.

After discussing that the jury also found the aggravating circumstance of

"especially heinous, atrocious or cruel,"[11] the court stated:

> It is nevertheless true that this aggravating circumstance ["especially heinous, atrocious or cruel"] was considered by the Pike County trial jury, and argued by the State at trial as an additional reason for imposing the death sentence. We cannot know what the sentence of the jury would have been in the absence of this aggravating circumstance.
>
> It is our view that <u>under the facts of this particular case</u> another sentencing jury, rather than this Court should decide whether Johnson shall be sentenced to life imprisonment or the death sentence reimposed. [Emphasis added.]

547 So.2d at 60-61.

Faced with the presentation of inadmissible information in the form of the vacated prior conviction, coupled with

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[11] The "especially heinous" aggravating circumstance in <u>Johnson</u> suffered the same inadequacy as the one in the case at bar: there was no limiting language in the instruction.

the lack of a narrowing instruction on the "especially heinous" aggravating factor, the Court clearly decided that it could not hold beyond a reasonable doubt that the sentence would have been the same. Therefore, the court below demonstrates it will responsibly apply a harmless error analysis on a case by case basis.[12]

This Court held that the <u>Chapman</u> harmless error test "is a familiar standard to all courts." 386 U.S. at 24. Consequently, deciding whether the sentence would have been the same after a consideration of an invalid aggravating

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[12] Petitioner misreads the majority in <u>Johnson v. State</u> as relying exclusively on the invalidity of the "prior conviction" aggravating circumstance as the reason for remand to the trial court for a new sentencing hearing. However, the court below considered the effect of <u>two</u> invalid aggravating circumstances on the sentence when making this decision.

circumstance doubt is not a task an appellate court is ill equipped to perform. To support this conclusion we rely on the recent decision of this Court in Satterwhite v. Texas, 486 U.S. ___, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988). There the Court held:

> It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer. Nevertheless, we believe that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury. Accordingly, we hold that the Chapman harmless error rule applies to the admission of psychiatric testimony in violation of the Sixth Amendment right set out in Estelle v. Smith. [Emphasis added.]

100 L.Ed.2d at 295.

See also, Rose v. Clark, 478 U.S. 570 (1986); Delaware v. Van Arsdall, 475 U.S. 673 (1986).

The testimony in Satterwhite went to support the future dangerousness "Special Issue", which is somewhat akin to an aggravating circumstance in Mississippi. While the Texas statute does not require a weighing of aggravating and mitigating circumstances as the Mississippi statute does, that distinction is apparently not controlling.

In Adams v. Texas, 448 U.S. 38 (1980) this Court stated:

> Nevertheless, jurors in Texas must determine whether the evidence presented by the State convinces them beyond reasonable doubt that each of the three questions put them must be answered in the affirmative. In doing so, they must consider both aggravating and mitigating circumstances, whether appearing in the evidence presented at the trial on guilt or innocence or

during the sentencing proceedings.

448 U.S. at 46.

The Court expounded on this statement in Franklin v. Lynaugh, 487 U.S. ___, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988). The Court noted:

> 12. We also repeat our previous acknowledgment, that--as a practical matter--a Texas capital jury deliberating over the Special Issues is aware of the consequences of its answers, and is likely to weigh mitigating evidence as it formulates these answers in a manner similar to that employed by capital juries in "pure balancing" States. See Adams v. Texas, supra, at 46, 65 L.Ed.2d 581, 100 S.Ct. 2521. Thus, the differences between the two systems may be even less than it appears at first examination. [Emphasis added.]

101 L.Ed.2d at 171 n. 12.

Further, in Penry v. Lynaugh, 492 U.S.___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the Court, quoting the concurring

and dissenting opinions in Franklin, stated:

> "[T]he right to have a sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration" in imposing sentence." [Emphasis added.]

106 L.Ed.2d at 280.

This again reinforces the conclusion that the difference between pure weighing and non-weighing statutes is not a controlling factor in this issue. Since the difference between weighing statutes and non-weighing statutes is not a determinative factor the teachings of Satterwhite apply with full force to the case at bar. The conclusion is inescapable that there is no constitutional infirmity in allowing this type analysis by an appellate court.

Likewise, the fact that the jury under Mississippi's statutory scheme makes the determination of sentence instead of a judge is of no constitutional import. In Spaziano v. Florida, 468 U.S. 447 (1984), the Court held:

> We are not persuaded that placing the responsibility on a trial judge to impose the sentence in a capital case is so fundamentally at odds with contemporary standards of fairness and decency that Florida must be required to alter its scheme and give final authority to the jury to make the life-or-death decision.

468 U.S. at 465.

Therefore, the fact that the appellate court reconsiders a jury's sentencing verdict rather than a judge's sentencing verdict is of little import. See, Cabana v. Bullock, 474 U.S. 376 (1986). As long as the appellate court has the full record before it when it reconsiders the sentence, there is no

legitimate concern. Petitioner has not been deprived of any due process right since the jury did make the determination of death as the appropriate punishment in this case.

Petitioner also labors under the misconception that the Mississippi Supreme Court is prevented from applying a harmless error analysis to the sentence phase of a capital murder trial by the state statute requiring a jury to return a sentence of death.[13] Miss. Code Ann. §99-19-102(2) (Supp. 1989). The jury returned a death sentence in this case. The statute was followed. All the Mississippi Supreme Court did on appellate review was to apply a harmless error analysis and

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[13] Respondent does not argue and state law does not permit the Mississippi Supreme Court to impose the sentence of death initially or override a jury verdict of life and impose a sentence of death.

reconsidered the sentence imposed by the jury without the presence of the invalid aggravating factor.[14]

The Mississippi Supreme Court is allowed to interpret the laws of Mississippi. It is the well established province of state courts "to interpret and, where they see fit, to reinterpret" their own constitutions and statutes. See

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[14] Section 99-19-105(3), Miss. Code Ann. (Supp. 1989) outlines the supreme court's duties regarding sentence review. The subsection reads:

> With regard to the sentence, the court shall determine:
> (a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;
> (b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101; and
> (c) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. [Emphasis added.]

Gardner v. Louisiana, 368 U.S. 157, 169 (1961). An authoritative interpretation of a state statute by the state's highest court "puts these words in that statute as definitely as if it had been amended by the legislature." Winters v. New York, 333 U.S. 507, 514 (1948). Moreover, under Mississippi law, the state supreme court has the "inherent power to prescribe rules of procedure to facilitate the administration of justice in [Mississippi] courts."[15] Newell v. State, 308 So.2d 71, 78 (Miss. 1975); Hall v. State, 539 So.2d 1339 (Miss. 1989). The Mississippi Supreme Court has not only held that it can affirm a sentence of death where it

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[15] In Jackson v. State, 337 So.2d 1242 (Miss. 1976), the Mississippi Supreme Court judicially construed our mandatory death penalty statute to be permissive, striking out the mandatory provisions and creating a bifurcated proceeding for the determination of sentence.

finds invalid aggravating circumstances,[16] but it also has held that it can reimpose a sentence of death after it has been vacated by a federal court without having to remand the case for retrial before a jury.[17] Therefore, there is no state law prohibition to preforming a harmless error or reweighing process.

Respondent would submit that since a "reviewing court can make an intelligent judgment about whether the erroneous admission of [an aggravating circumstance] might have affected a capital sentencing jury," Satterwhite, 100 L.Ed.2d at 295, the Constitution of the United States is

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16 See footnote 6, supra.

17 See: Reddix v. State, 547 So.2d 792 (Miss. 1989); Johnson v. State, 547 So.2d 59 (Miss. 1989); Booker v. State, 511 So.2d 1329 (Miss. 1987), cert. denied, ___ U.S. ___, 99 L.Ed.2d 492, reh. denied, ___ U.S. ___, 100 L.Ed.2d 237 (1988); Bullock v. State, 525 So.2d 764 (Miss. 1987).

not offended by the application of a harmless error or reweighing analysis regarding an invalid aggravating circumstance.

II.
The Especially Heinous, Atrocious Or Cruel Aggravating Factor Is Not Per Se Unconstitutional, And, As Construed By The Mississippi Supreme Court, Is Properly Limited.[18]

This Court in Maynard v. Cartwright, supra, held that the consideration by an Oklahoma jury of the "especially heinous, atrocious or cruel" aggravating factor without a limiting instruction violated the Eighth Amendment because it did not provide a meaningful basis upon which to "distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 100 L.Ed.2d at 381;

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[18] The Court granted certiorari to consider the first question presented in the petition. However, petitioner has recast the question presented to include other issues not encompassed by the original question. Respondent is compelled to briefly respond to these additional questions.

Godfrey v. Georgia, 446 U.S. 420, 433 (1980). In Maynard, the Court noted:

> The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to cure the jury's unchanneled discretion because that court failed to apply its previously recognized limiting construction of the aggravating circumstance.

100 L.Ed.2d at 381.

Respondent reads this passage as allowing an appellate court to cure the error of a vague instruction on this circumstance by applying a limiting construction at the appellate stage of the proceedings. Like Georgia, the Mississippi Supreme Court has placed a construction on the "especially heinous, atrocious or cruel" aggravating circumstance that passes constitutional muster. In Coleman v. State, 378 So.2d 640 (Miss. 1979), the court below adopted the construction found in Spinkellink v.

Wainwright, 578 F.2d 582 (5th Cir. 1978), which held:

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

578 F.2d at 611.

Later in Evans v. State, 422 So.2d 737 (Miss. 1982), the court expanded the construction to include cases in which "mental torture and aggravation" were inflicted upon the victim.[19]

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[19] The Mississippi court has further refined its construction of the "especially heinous" aggravating factor since the decision in this case in Pinkney v. State, 538 So.2d 329, 355-358 (Miss. 1988). The court held:

> We note also that the barbarity sufficient to satisfy this aggravating circumstance can be demonstrated by showing that the defendant utilized a method of killing which caused serious mutilation, where there is

Unlike Georgia, the Mississippi Supreme Court applied its previously recognized limiting construction to the facts of this case. Citing Coleman and Evans, the court said the facts surrounding the murder of Arthur Shorter were brutal and torturous. 535 So.2d at 1364. The court also observed:

> Clemons, with the gun in his hand, told Arthur Shorter, the pizza delivery man, to get out of the vehicle and told him to "take out everything you have" and to take all his money out of his pockets. At that time, either Clemons or Hay threw the keys to the pizza delivery vehicle into the bushes. Clemons ordered Shorter to lie down, which he did. Clemons took the bag of money and some pizzas from the

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> dismemberment of the corpse, where the defendant inflicted physical or mental pain before death, or where a lingering or torturous death was suffered by the victim. See also, Billiot v. State, 454 So.2d 455, 464-65 (Miss. 1984).

538 So.2d at 357.

delivery vehicle. As he started on his way back to the car in which Calvin was sitting, Hay asked Clemons if Shorter had seen his face. Clemons replied in the affirmative. Hay then said, "Chandler, you got to blow his head off because he can identify you." Shorter begged Clemons not to shoot him. Clemons told Hay to pull their car farther down the hill, which he did. Clemons shot Shorter and got into the car with Hay and Calvin and the started down the hill. Calvin looked back and saw Shorter raise his head once.

The physical facts indicate that death for Shorter was not instantaneous; that after being shot, he dragged himself to his vehicle and attempted to get into it; and that, having no keys with which to start the vehicle, he began making his way toward the apartment complex. After going some distance, he collapsed and died sometime later.

535 So.2d at 1356.

A reading of these facts clearly show that this case falls within the limiting construction of "especially heinous, atrocious or cruel" adopted by the

Mississippi Supreme Court in Evans and Coleman. Shorter was killed execution style clearly making it conscienceless. He was begging for his life when he was shot, satisfying both the pitiless and mental torture requirements of the construction. Shorter did not die or lose consciousness instantly, suffering a lingering death. Therefore, he had time to realize his mortal situation. This also fulfills the mental torture and aggravation requirement. In short, the evidence amply satisfies the limiting construction placed on this circumstance by the Mississippi Supreme Court.

The Mississippi Supreme Court, like Respondent, read Maynard and Godfrey to allow the infirmity in this aggravating circumstance to be cured by an application of its limiting construction at the appellate level. That court followed this

procedure and applied its limiting construction to this case. This clearly was an additional ground upon which the Mississippi Supreme Court affirmed the sentence of death in this case.

While this limiting construction of "especially heinous atrocious or cruel" as been used since 1979, the application of this construction by the Mississippi court has not always been found to be consistent. The Court of Appeals for the Fifth Circuit has noted that the construction has been more "honored in breach than observance." Johnson v. Thigpen, 806 F.2d 1243, 1247 (5th Cir. 1986), cert. denied, 480 U.S. 951 (1987). However, the Fifth Circuit was not compelled to reverse in Johnson v. Thigpen.

In Johnson v. Thigpen, the Fifth Circuit recognized that the Mississippi

statute was unlike the statute in Georgia.[20] It noted:

> Georgia does not narrow the class of persons eligible for the death penalty by defining specific classes of murders that are capital murder. Gregg, 428 U.S. at 196, 96 S.Ct. at 2936. Rather, the aggravating circumstances are the sole statutory narrowing mechanism. Id. at 196-97, 96 S.Ct. at 2936. Thus, in Godfrey, when the Georgia Supreme Court did not properly limit the "outrageously or wantonly vile" aggravating circumstance, there was indeed "no principled way to distinguish [Godfrey's] case, in which the death penalty was imposed, from the many cases in which it was not." . . .
>
> No such failure exists in the present case. Even given Mississippi's broadened construction of the especially heinous aggravating circumstance, . . . , the Mississippi capital murder statute still narrows the class of persons eligible for the death penalty. In the present

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[20] In Florida and Oklahoma any first degree murder is eligible for the death sentence after the finding of a single aggravating circumstance.

case, for example, Johnson was convicted of the murder of a peace officer acting in his official capacity. This element of a capital offense in Mississippi is a statutory aggravating circumstance in Georgia. . . . The definition of capital murder in Mississippi serves the same narrowing function as the parallel aggravating circumstance would in Georgia.

In fact, the Mississippi death penalty statute, as applied in this case, is indistinguishable from the Texas statute. In approving the Texas statute in Jurek, the Supreme Court recognized that, by defining capital murder narrowly, "in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. . . . The Mississippi statute, unlike the Texas statute, provides the added protection of requiring proportionality review by the state supreme court.

806 F.2d at 1248-1249.

Thus, the Mississippi statute provides for a double narrowing process, first, by defining only certain murders as capital

murder and second requiring that aggravating circumstances be found after conviction of this narrowly defined murder. The fact that the weighing process comes after the point of the second narrowing decreases its importance in the determination of the sentence. In fact it takes it out of the realm of a weighing statute. See, Flamer v. State, 490 A.2d 104, 134-136 (Del. 1984), cert. denied, 474 U.S. 856 (1985).

Finally, we must respond to the allegation that victim impact evidence was introduced in support of the "especially heinous" aggravating circumstance. Petitioner is attempting to raise, for the first time, a claim under Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. ___, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989) through the back door.

There was testimony by Shorter's father during the guilt phase of the trial relating the victim's age, his marital status, that he had a three year old son, had a college degree and held two jobs. The main purpose of Matthew Shorter's testimony was to identify the deceased, relate to the jury that he was a living person earlier on the day of the murder and state that he was no longer alive. Tr. 726-733. However, no objection was raised to the introduction of this testimony at trial. Therefore, no claim could have been raised on direct appeal to the court below concerning this claim. In Cole v. State, 525 So.2d 365 (Miss. 1987) the court below held:

> Counsel may not sit idly by making no protest as objectionable evidence is admitted, and then raise the issue for the first time on appeal. If no contemporaneous objection is made, the error, if any is waived. This rule's applicability is not diminished in a capital case.

525 So.2d at 369.

Later, during the first closing argument of the sentence phase of this trial the assistant district attorney summarized the father's testimony and telling the jury that Shorter's father had instilled the "work ethic" in his son and that he would be seen by his mother and father again. Tr. 1168-1169. Again no objection was interposed by defense counsel to this argument.[21] Therefore, any claim relating thereto is barred. Cole, supra.

Petitioner would have us believe that this testimony was introduced only for the

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[21] This argument was made during the first half of the state's divided argument. Both defense counsel had the opportunity to argue after this argument was made. The district attorney did not return to this topic in his final argument.

purpose of supporting the "especially heinous" aggravating circumstance. This is not supported by the record. The argument relating to the "especially heinous" aggravating factor preceded the above argument. It reads:

> Then it [the instruction] says, "the capital offense was especially heinous, atrocious or cruel." What more heinous can you have or more cruel or atrocious can you be than for a man to be crawling on the ground and you stick a 20-gauge shot gun to his head and shoot him. What more cruel, atrocious or heinous can you be when a man begs you for mercy, "Take all I've got, just don't shoot me". And you still point a gun to his head while he is on the ground and shoot him.
>
> It says, "you must unanimously find beyond a reasonable doubt that one or more of these proceedings, [sic] aggravating circumstances exist." Both need not exist. All you need to find is just one of them.

Tr. 1166-1167.

Clearly, from a reading of the argument the assistant district attorney had finished his argument on the "especially heinous" aggravating circumstance prior to his references to Arthur Shorter the person. The testimony and argument about Arthur Shorter and his life were not introduced or used to support the "especially heinous" aggravating circumstance. The jury was never told that they could consider this evidence in support of the "especially heinous" aggravating circumstance or as a separate aggravating circumstance to support the death sentence. This theme was not returned to by the district attorney in the final argument of the State. No claim having been made under Booth or Gathers below, this argument is not properly

before the Court.[22] Webb v. Webb, 415 U.S. 493 (1981); Street v. New York, 394 U.S. 576 (1969); Cardinale v. Louisiana, 394 U.S. 437 (1969).

Nothwithstanding, the holding of Goode, supra, supports affirmance here as

> whatever may have been true of the sentencing [jury], there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the [Mississippi] Supreme Court considered [Shorter's character].

464 U.S. at 86-87.

Since no improper evidence was considered by the Mississippi Supreme Court in reweighing the aggravating and mitigating circumstances, the affirmance of the sentence of death should stand.

CONCLUSION

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[22] It is also noteworthy that Booth was decided on June 15, 1987 and petitioner's trial began on July 20, 1987. 535 So.2d at 1355. Therefore, objections under Booth were available to petitioner.

For the above and foregoing reasons the decision of the Mississippi Supreme Court affirming the sentence of death in this case should be affirmed.

Respectfully submitted,
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October 16, 1989

CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing **Brief for Respondents** to the following:

Kenneth S. Resnick, Esquire
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This the 16th day of October, 1989.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.